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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 426

MORIZO NAKASHIMA, AS EXECUTOR OF THE LAST WILL OF AKIRA MORIMOTO, DECEASED, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion in denying the respondent's motion to dismiss on the ground that the action was barred by the limitations of time prescribed by Section 33 of the Trading with the Enemy Act (R. 8-9). After a trial on the facts the District Court wrote a "Memorandum and Order," which is not reported but which appears in the record at pages 13 to 27. The opinion of the Court of Appeals, reversing the District Court on the ground that the action was barred by

Section 33, is reported at 243 F. 2d 787, and appears in the record at pages 171 to 177.

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1957 (R. 178). The petition for rehearing was denied June 7, 1957 (R. 179). The petition for a writ of certiorari was filed on September 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the provision of Section 33 of the Trading with the Enemy Act, which provides that suits under Section 9(a) to recover vested property must be instituted within two years after vesting, is so unreasonably short as to amount to a deprivation of property without due process of law, when applied to a suit brought by petitioner's decedent, who was a prisoner of war when the property was vested in 1947 and who returned to Japan in 1948 and lived there for two years thereafter.

STATUTE INVOLVED

The relevant provisions of the Trading with the Enemy Act are Sections 9(a), 32(a)(1) and (2)(D), and 33, Section 33 is reprinted in the petition for certiorari, pp. 4-5, and Sections 9(a) and 32(a)(1) and (2)(D) are reprinted in Appendix A, *infra*, pp. 9-12.

STATEMENT

Akira Morimoto, the decedent, was a dual national, born in California in 1912 of Japanese parents (R. 31). In 1924 he was taken by his parents to Japan, where he lived until 1950, except for the war years (R. 31-32, 51). He served as a medical officer with the Japanese Army in Manchuria until 1945, when he was taken prisoner

by the Russians. He was a prisoner of war in Siberia until late 1948, when he was repatriated, returning to Japan on December 4, 1948 (R. 31).

Morimoto inherited the property in question from his father in 1932 (R. 86-87, 92). The Attorney General vested the property (two lots of improved real property in Fresno, California, and accrued rentals, with a total value of about $11,500) by a vesting order which was filed with the Division of the Federal Register on December 17, 1947 (R. 29). Morimoto learned of the vesting shortly after his return to Japan in December 1948 (R. 48-49). In April 1949 he applied to the United States consulate in Yokohama for a passport (R. 49). That was the first time, so far as the record shows, that he claimed United States citizenship.

When Morimoto and his parents went to Japan in 1924, they left in the United States two older brothers, one of whom became a partner in the business the father had conducted (R. 42, 86). According to the complaint, one of these brothers learned of the vesting order of December 1947 in September 1949 (R. 5). On or about October 17, 1950, this brother, acting under a power of attorney from Morimoto, filed a notice of claim with the Office of Alien Property and brought this suit on October 23, 1950 (R. 5, 171).

Morimoto returned to the United States in December 1950, and filed an amended complaint September 28, 1951 (R. 6, 7).

The respondent moved to dismiss the action on the ground that it had not been brought within the period of time limited by Section 33 of the Trading with the Enemy Act. The District Court denied the motion (R. 8-9). After a trial the court entered judgment for the plaintiff (R. 35), finding *inter alia*, that it was not

true that the action was commenced after the time limited by Section 33 of the Act (R. 33) and that he brought the suit "as soon as he reasonably could" (R. 31-32).

The Court of Appeals reversed, holding that under Section 33 the time for bringing suit expired December 16, 1949 (R. 171-177).

ARGUMENT

The governing provision of Section 33 of the Act is that "No suit pursuant to section 9 may be instituted * * * after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian".[1] The vesting order was effective, and the property "vested", when the order was filed with the Federal Register (8 C.F.R., 1952 Revision, § 504.1; 17 F.R. 1082) on December 17, 1947. The two-year period ended December 16, 1949, and this action brought in October 1950 was thus ten months too late. The decision of the Court of Appeals is supported, therefore, by the plain language of the statute. In another recent case the Court of Appeals for the Second Circuit in *Grabbe* v. *Brownell*, decided July 30, 1957, not yet reported,[2] followed and approved the decision of the Ninth Circuit in the instant case. (The text of the Second Circuit's opinion in the *Grabbe* case is set out in Appendix B, *infra*, pp. 13-17.)

The uniform course of decisions under Section 33 is that it is to be applied according to its terms, and that a court is without jurisdiction to entertain a suit brought after the period of limitations. *Pass* v. *Mc-*

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[1] By Executive Order No. 9788 (October 14, 1946, 11 F.R. 11981) the Attorney General succeeded to the functions and authority of the Alien Property Custodian.

[2] Affirming *Grabbe* v. *Brownell*, 140 F. Supp. 4 (E.D. N.Y.).

Grath, 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U. S. 910; *Kroch* v. *McGrath*, 192 F. 2d 416, (C.A.D.C.) certiorari denied, 342 U. S. 927; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Cisatlantic Corporation* v. *Brownell*, 222 F. 2d 957 (C.A. 2), affirming 131 F. Supp. 406 (S.D.N.Y.); *Kroll* v. *McGrath*, 91 F. Supp. 173 (D.D.C.); *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D.Ore.); *First National Bank of Portland* v. *McGrath*, 97 F. Supp. 77 (D.Ore.).

As amended in 1948, and as it stood until 1954, Section 33 imposed on the filing of both claims and suits a time limit of April 30, 1949, or the expiration of two years from the date of vesting, whichever was later. In 1954, however, Congress amended the first sentence of Section 33 to extend to February 9, 1955, the time for the filing of notices of claim. Public Law No. 292, approved February 9, 1954 (68 Stat. 7). The 1954 amendment left unchanged the limitation of time on the bringing of suits, and the courts have held that Congress did not intend, when it granted additional time for the filing of administrative claims, to extend the time for suits. See *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D.Ore.); *Grabbe* v. *Brownell*, 140 F. Supp. 4 (E.D. N.Y.), affirmed July 30, 1957 (C.A. 2), as well as the opinion of the Court of Appeals in the instant case (R. 173-176).

Petitioner argues that in the case of many claimants, who were under some disability or were beyond seas, or both, the period of two years for the bringing of suits was so unreasonably short as to amount to a denial of due process.

In the instant case it appears, from Morimoto's own testimony (R. 48-49), that he, though in Japan, learned

of the vesting shortly after his return to Japan in December 1948, so that he had a period of about a year in which to sue, or about eight months if one accepts his contention that regulations of the occupation authorities shut off his access to the courts of the United States until April 1949 (R. 176). That would appear to have been a sufficient period of time to enable an ordinarily diligent man to bring suit. See *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 562; *McCloskey & Co.* v. *Eckart*, 164 F. 2d 257, 260 (C.A. 5). Petitioner may not attack the constitutionality of the statute on the ground that on other facts its application might be unconstitutional.[3] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461-462; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 479.

Apart from the facts of this case, it can not be said that the judgment of Congress that a period of two years after vesting was sufficient was unreasonable. Congress knew that it was legislating for the claims of many people who were in foreign countries, including prisoners of war and persons in displaced persons' camps. But displaced persons, residents of enemy countries, and residents of countries the enemy had occupied, would be, in very many cases, "enemies" within the Act and unable by virtue of that fact to sue under Section 9(a). Their remedy would be by administrative claim under Section 32, and they would not be affected by the limitation on suits. *Guessefeldt* v. *Mc-*

[3] Under the 1954 amendment Morimoto's 1950 notice of claim was timely filed. If petitioner is himself eligible for a return it would appear that the property might be returnable by administrative action under the "dual national" provisions of Section 32(a)(2)(D) (*infra*, pp. 10-12) if return is found to be in the national interest.

Grath, 342 U.S. 308, 314-315. A two-year statute of limitations is not uncommon (see, for example, Federal Rules of Civil Procedure, Rule 25(a)), and, under Section 33, the person whose property was vested could stop the running of the two-year period merely by filing a notice of claim. *First National Bank of Portland* v. *McGrath*, 97 F. Supp. 77 (D.Ore.). Statutes of limitation are of necessity practical and rigid, and shut off all untimely claims, meritorious and otherwise, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314; *Kavanagh* v. *Noble*, 332 U.S. 535, 539. There is no constitutional requirement that in a statute of limitations Congress must provide exceptions for prisoners of war and persons beyond seas,[1] any more than for infants. See *Vance* v. *Vance*, 108 U.S. 514. Petitioner's contention would amount to reading into Section 33 an exception based on wartime conditions. A similar contention has very recently been rejected by this Court. *Soriano* v. *United States*, 352 U.S. 270. Balancing, as Congress had a right to do, the interest in a prompt termination of alien property litigation against the interests of such claimants who might not be "enemies" and who might be in enemy countries, the imposition of a two-year limitation on suits can not be said to have been so unreasonable as to amount to a denial of fair treatment, certainly as applied to the facts of this case.

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[1] There is no question of a repeal by implication of Section 2401, 28 U.S.C. Although a suit under Section 9(a) is in substance a suit against the United States, the defendant is the Attorney-General and Section 2401 would seem not to apply. When Congress first enacted Section 33 in 1946 it did so on the understanding that there was no statute of limitations applicable to suits under Section 9(a). S. Rep. No. 1839, 79th Cong., 2d Sess., p. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
DALLAS S. TOWNSEND,
Assistant Attorney General.
GEORGE B. SEARLS,
Attorney.

OCTOBER, 1957.

APPENDIX A

Trading with the Enemy Act, as amended
(40 Stat. 411, 50 U.S.C., App. 1, *et seq.*)

Sec. 9(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United

States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * * *

SEC. 32 (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately

prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further*, That, notwithstanding the provisions of subdivision (C) hereof and of this subdivision (D), return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to the date of enactment of this

proviso if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage: *And provided further,* That the aggregate book value of returns made pursuant to the foregoing proviso shall not exceed $9,000,000; and any return under such proviso may be made if the book value of any such return, taken together with the aggregate book value of returns already made under such proviso does not exceed $9,000,000; and for the purposes of this proviso the term "book value" means the value, as of the time of vesting, entered on the books of the Alien Property Custodian for the purpose of accounting for the property or interest involved; * * *

* * * * * *

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 339—October Term, 1956

(Argued April 12, 1957 Decided July 30, 1957)

Docket No. 24474

XENIA GRABBE AND OLGA GAYDEBOUROFF,
PLAINTIFFS-APPELLANTS,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, DEFENDANT-APPELLEE

BEFORE:

MEDINA and WATERMAN, *Circuit Judges*, and LEIBELL, *District Judge*.

Plaintiffs appeal from decision below, D.C., E.D., N.Y., Rayfiel, *J.*, reported at 140 F. Supp. 4, dismissing their action for lack of jurisdiction. Affirmed.

WATERMAN, *Circuit Judge*:

The appellants, Xenia Grabbe and Olga Gaydebouroff, appeal from an order granting defendant's motion to dismiss their complaint on the ground that the District Court lacked jurisdiction over the subject matter of the action. The opinion below is reported at 140 F. Supp. 4 (1956).

Appellants sued to recover property vested by the Alien Property Custodian by a vesting order dated August 21, 1944, and filed with the Federal Register on September 1, 1944. See 9 Fed. Reg. 10790 (1944). The vested property comprised ten shares of capital stock of a New York corporation, bequeathed to the

appellants under the will of one Katherine Johnson Ashe. The corporation was subsequently liquidated, and the proceeds of the ten vested shares, totaling slightly less than $15,000, were paid to the appellee, the Attorney General of the United States. The complaint further alleged that at the time of vesting the appellants were stateless infants, aged fourteen and twelve respectively, and that they were not voluntarily residents of an enemy country within the mean [sic] of the Trading with the Enemy Act, 50 U.S.C.A. App. §§ 1-40.

On June 16, 1952, the appellants filed a notice of claim to the property in question with the Attorney General. This action was not instituted, however, until December 12, 1955. The District Court dismissed the complaint on the ground that the suit was barred by section 33 of the Trading with the Enemy Act, 50 U.S.C.A. App. § 33 (Supp. 1954),[1] the applicable statute of limitations.

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[1] That section provides:

No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later; except that return may be made to successor organizations designated pursuant to section 32(h) of this Appendix if notice of claim is filed before the expiration of one year from August 23, 1954. No suit pursuant to section 9 [section 9 of this Appendix] may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof [section 9 or 32(a) of this Appendix].

The appellants were legally admitted to this country in July 1950 and September 1951, respectively. They assert that they did not learn of the defendant's seizure of their legacies until sometime after their arrival. At the time the appellants first filed a claim with the Attorney General for the return of the seized property—June 16, 1952—they were barred by the then existing applicable statute of limitations from either filing a claim or from instituting a judicial action. However, on February 9, 1954, section 33 of the Trading with the Enemy Act was amended so as to extend the available period in which to file a claim, thereby rendering the plaintiffs' claim for administrative relief timely. But this 1954 amendment did not expressly confer upon claimants any new right to sue the United States, nor did it extend the time previously provided for bringing suits to recover vested property. Both before and after amendment, section 33 contained the following provision:

> "No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof."

Since the property here in issue was vested in 1944, and since no suit or claim by the appellants was pending prior to 1952, it is clear from the express language of section 33 that a judicial remedy was no longer available to them in 1955. The appellants attempt to avoid the clear and unambiguous language of section 33 by citing the broad congressional purpose behind

the 1954 amendment, which was designed to give many people an extended opportunity to recover property that had been vested by the United States. See H. Rep. No. 1114, 83d Cong. 2d Sess. (1954); S. Rep. No. 615, 83d Cong., 2d Sess. (1954). But their contentions, along with several other ingenious arguments, were recently rejected by the Court of Appeals for the Ninth Circuit in its able opinion in *Brownell* v. *Nakashima*, 243 F. 2d 787 (9 Cir. 1957), where the plaintiffs also sought to escape the impact of section 33. See also *Pedersen* v. *Brownell*, 129 F. Supp. 952 (D. Ore. 1955). Cf. *Pass* v. *McGrath*, 192 F. 2d 415 (D. C. Cir.), *cert. denied*, 342 U.S. 910 (1952); *Cisatlantic Corp.* v. *Brownell*, 131 F. Supp. 406 (S. D. N. Y., 1953), *aff'd* 222 F. 2d 957 (2 Cir. 1955). We adopt the reasoning of the *Nakashima* decision.

Nor do we think that we should ignore the clear mandate of this statute because of an alleged inconsistency in the decision of Congress extending the time during which individuals may seek to recover their property by filing a claim for relief with the Attorney General, while leaving unchanged the period in which judicial relief may be sought in the federal courts. The varying considerations distinguishing administrative remedies from judicial remedies may well have been thought by Congress sufficient to warrant substantially different statutes of limitations governing these two separate courses to the recovery of vested property.

The appellants also argue that the general statutory limitation of six years for civil actions against the United States, embodied in 28 U.S.C.A. § 2401(a), should apply to this suit, and that their right of action first accrued in 1954 at the time of the enactment of amended section 33. Even assuming, *arguendo*, that appellants' claim first arose in 1954, we cannot apply a general statute of limitations to a class of claims for

which Congress has provided a specific statute fixing the time within which suit may be brought. *Cf. United States* v. *A. S. Kreider Co.*, 313 U.S. 443, 447 (1941).

The personal hardship that may be involved here is not relevant to the question of statutory construction before us. To the contrary, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

The plaintiffs' efforts to attack the constitutionality of section 33 do not warrant discussion. Again, for a complete answer, we advert to the reasoned opinion of our brethren of the Ninth Circuit in *Brownell* v. *Nakashima*, 243 F. 2d 787, 792 (9 Cir. 1957).

Order affirmed.